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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE RUSHING,

Defendant and Appellant.

E039872

(Super.Ct.No. FSB048582)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S.

McCarville, Judge. Affirmed with directions.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Kevin Vienna, Supervising Deputy Attorney General, and Theodore M. Cropley, Deputy Attorney General, for Plaintiff and Respondent.

In a bifurcated trial, a jury found defendant Eugene Rushing guilty of one count of second degree robbery. (Penal Code,¹ § 211.) After a court trial on defendant's priors, the trial court found all the allegations of defendant's prior convictions true. On appeal, defendant claims that the trial court denied him his federal constitutional right to a jury trial and due process when it sentenced him to the upper term in violation of *United States v. Booker* (2005) 543 U.S. 220, *Blakely v. Washington* (2004) 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). Defendant has submitted a supplemental brief asserting that *Cunningham v. California* (2007) 549 U.S. ____, 2007 Lexis 1324, 75 U.S.L.W. 4078 (*Cunningham*) requires that a jury find aggravating factors before a trial court may impose the upper term. We conclude that defendant waived this claim by failing to object at the time of sentencing. Even if his claim were preserved, *Cunningham* reaffirms that prior convictions can increase the existing penalty. Defendant also asserts that his attorney rendered ineffective assistance of counsel when he failed to challenge the sentence. As the record fails to detail the reasons why counsel acted as he did, we conclude that defendant did not meet his burden in proving defense counsel was ineffective. Finally, we agree with the parties that the abstract of judgment fails to reflect the correct statute under which the five-year enhancement was imposed. Consequently, we direct the trial court to prepare an amended abstract with the correct statutory citation.

¹ All further statutory references will be to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

In an amended information, defendant was charged with one count of second degree robbery (§ 211) and one count of using a dangerous and deadly weapon (a knife). (§ 12022, subd. (b)(1).) The prosecution also alleged that defendant was previously convicted of robbery and that this conviction was both a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior strike. (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i).) Lastly, the amended information alleged that defendant had three prior convictions. (§667.5, subd. (b).) Defendant pled not guilty and a bifurcated trial was held.

At trial, the victim Tammy Watkins testified that she was getting into her vehicle in a store's parking lot. Her daughter was seated in the middle of the back seat and her daughter's friend was seated in the right rear passenger seat. Watkins was getting into the driver's side of her vehicle when defendant put a knife up to her neck and demanded her purse. Watkins pulled the knife away from her throat and kicked him away. Defendant reached over her body into the car, grabbed her purse, and ran away. Inside the purse were four wallets, a cell phone, a calculator, and some papers.

Eleven days later, Tammy Watkins' husband, Brian Watkins, received a cell phone call from a man who said his name was "Larry"² Defendant claimed that he found Mrs. Watkins' purse on the ground and was calling to inquire if there was a reward for its return. Mr. Watkins testified that he wanted to retrieve his wife's purse, so he agreed to meet defendant. As defendant hung up, Mr. Watkins noted that the caller ID showed

² "Larry" was subsequently determined to be the defendant; see post, p. 4.

“Roselyn Brooks” as the caller, with a specific phone number. When defendant called back 15 minutes later to arrange a meeting place for Mr. Watkins to pick up his wife’s purse, he explained that he did not want Mr. Watkins to believe he was responsible for the purse snatching. Mr. Watkins noted that the caller ID reflected that the caller was “Alfreda Rushing” with a different telephone number from the previous call.

Mrs. Watkins accompanied Mr. Watkins to the designated rendezvous to retrieve her purse. She remained in the car while Mr. Watkins approached a man who matched the description defendant had given of himself. When the two men met, defendant returned the smaller wallets, along with credit cards and receipts containing bank account numbers. However, he did not give back the victim’s big purse. Defendant asked for a reward and for one of the small wallets. Mr. Watkins testified he acquiesced to defendant’s request.

Mr. Watkins then asked defendant to meet his wife, so he brought defendant over to his vehicle. After the introductions, defendant walked away, and Mrs. Watkins confirmed that he was the man who had robbed her.

After approximately seven hours of deliberation, the jury found the defendant guilty on the second degree robbery count. The jury was unable to reach a verdict on the personal use of dangerous and deadly weapon allegation (§ 12022, subd. (b)(1)) so the trial court declared a mistrial on that count, which was later dismissed by the prosecution. The court then conducted a bench trial on the defendant’s prior convictions. The prosecution presented evidence that defendant had suffered three state prison priors convictions. On April 9, 1990, a Los Angeles County jury convicted defendant of second

degree robbery (§ 211) committed with a firearm. (§12011, subd. (a)(1).) He was sentenced to state prison for five years on the robbery and one additional year for the armed allegation for a total of six years. On January 10, 1997, a Los Angeles County jury found defendant guilty of possessing a controlled substance. (Health & Saf. Code, § 11350, subd. (a).) The court found true the allegation that the previous § 211 conviction was a prior strike. Defendant was sentenced to four years state prison, with one year imposed and stayed for the prior prison term. On November 9, 2001, defendant pled guilty in San Bernardino County to one count of possession for sale (Health & Saf. Code, §11351.5), in exchange for the trial court striking the prior strike. Defendant was sentenced to three years in state prison.

At the conclusion of the bench trial, the court found true all three of defendant's prior convictions. It also found true that the prior robbery conviction was a serious felony and a five-year prior. When the court was about to sentence defendant, defense counsel stated she was not ready to proceed, and instead requested a continuance to investigate whether a *Romero*³ motion could be filed.

Approximately four and one-half months later, the trial court sentenced defendant with new defense counsel present at the hearing.⁴ In its tentative decision, the court denied defendant probation. It designated the second degree robbery as the principal count. The court selected the upper term of five years, which was doubled to 10 years for

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

⁴ Defendant's new counsel at sentencing was not in attendance at trial.

the second strike conviction. It imposed an additional five years for the prior serious felony conviction. Then it imposed one-year terms for each of two⁵ of the prior prison term enhancements for a total sentence of 17 years. After announcing its tentative decision, defense counsel submitted on the probation report and asked the court to show leniency. Defense counsel stated that he investigated whether there was any ineffective assistance on the part of trial counsel, and finding none, refrained from filing any motions. The trial court also observed that no *Romero* motion was filed.

The trial court then sentenced defendant according to its tentative decision. It selected the upper term because defendant had a prior record of increasing seriousness, had numerous felony convictions, his prior performance on parole was unsatisfactory, and a felony conviction would not seriously impact his life or adversely affect his status in the community. Additionally, it determined that the victim was particularly vulnerable because she was terrified during her testimony. The probation report, which the trial court ordered filed, did not list any factors in mitigation, but documented several circumstances in aggravation, including that defendant used a weapon during the offense, had numerous prior convictions, served a prior state prison term, was on parole at the time of the offense, and defendant's prior performance on parole was unsatisfactory. The trial court also relied on pages three and four of the probation report that listed facts related to the crime. One of those facts was that defendant was armed and used a weapon.

⁵ Out of the three prior prison terms, the trial court imposed one year for only two
[footnote continued on next page]

DISCUSSION

A. *Defendant's Claim that the Trial Court Erred in Imposing the Upper Term Has Been Waived*

Defendant argues that the trial court violated his right to a jury trial by imposing the upper term without a jury finding that the aggravating factors were true. He asserts that the issue was preserved on appeal when defense counsel asked for ““some leniency”” in the matter. The People respond that defendant forfeited his right to appeal any sentencing error because it was not raised at the time of sentencing. We agree with the People.

A defendant's failure to request that the trial court exercise its discretion to dismiss or strike a conviction under *Romero* waives or forfeits his right to raise the issue on appeal. (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376.) Claims involving a trial court's failure to properly make discretionary sentencing choices are waived if counsel fails to object below. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354.) Counsel is charged with advocating the various choices at the sentencing hearing. Defects in the court's statement of reasons could be easily corrected if called to the trial court's attention. (*Id.* at p. 353.) So long as the parties are clearly apprised of the sentence and the reasons supporting the choices and were given a meaningful opportunity to object, the failure to lodge an objection to a trial court's sentencing choices at the hearing constitutes a waiver of the issue on appeal. (*Id.* at p. 356.)

[footnote continued from previous page]

of those priors because it was using the third prior as a strike and a five-year prior.

Here, defendant waived his claim that the trial court erred in sentencing him to the upper term. Although he was given a meaningful opportunity to object after the trial court announced its tentative decision, he did not timely object to the imposition of the upper term. After the trial court explained the basis for its decision, it invited argument from counsel. Defense counsel responded, “Your Honor, the Court was present through the trial. The Court has gone over the probation report. I would only hope . . . the Court could grant some leniency in this matter. And I’ll submit on the report.”

If counsel had objected at the time of sentencing, he could have given the trial court his reasons for advocating the imposition of the midterm. Failing that, we conclude that defendant has waived the right to assert any error in the reasons cited by the trial court for imposing the upper term. However, defendant insists that that waiver does not apply in this case because the trial court imposed an unauthorized sentence. We find that even if the issue had been preserved on appeal by a specific objection, the trial court had imposed a lawful sentence.

B. Even if Not Waived, Imposing the Upper Term Did Not Violate Defendant’s Right to a Jury Trial

Citing *Blakely v. Washington*, *supra*, 542 U.S. 296 and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, defendant argues that imposing the upper term violated his federal constitutional rights to a jury trial and due process because the findings in aggravation were made by the trial court and not by a jury.

At sentencing, the trial court cited the following reasons for imposing the upper term: the defendant’s prior record of increasing seriousness, numerous felony

convictions, unsatisfactory prior performance on parole, and the conviction's impact on his life. It also cited circumstances relating to the facts of the crime, including the victim's vulnerability and the use of a knife. *Cunningham, supra*, 549 U.S. ____ [2007 U.S. Lexis 1324] (*Cunningham*) held that California's determinate sentencing law violates *Apprendi*'s bright-line rule that any fact that increases the penalty for a crime beyond the statutory maximum must be proved beyond a reasonable doubt to a jury. (*Cunningham, supra*, at pp. 35-36.) Therefore, the trial court could not impose the upper term because the facts used to increase the term were not found by a jury beyond a reasonable doubt, namely, his record of increasing seriousness, his parole performance, the conviction's impact, the victim's vulnerability, or his use of a knife.

However, *Cunningham* reaffirms that a prior conviction can increase the sentencing penalty. (*Cunningham, supra*, at pp. 35-36 [*“Except for a prior conviction, ‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury’”* Italics added.]) Prior convictions are traditional sentencing factors used by a judge and need not be submitted to a jury to support a sentence. (*United States v. Booker, supra*, 543 U.S. at p. 244.) *Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. (*Ibid.*; *Apprendi, supra*, 530 U.S. at p. 490.)

But even if we were to assume that defendant was entitled to a jury trial on the issue of whether the upper term should be imposed, defendant could not prevail. In its reasons for imposing the upper term, the trial court cited circumstances relating to the

defendant such as his prior record of increasing seriousness, numerous felony convictions, unsatisfactory prior performance on parole, and the conviction's impact on his life. It also cited circumstances relating to the facts of the crime, including the victim's vulnerability and the use of a knife.

“[T]he finding of even one factor in aggravation is sufficient to justify the upper term. [Citation.]” (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.) Here, the trial court found that defendant suffered numerous prior convictions which increased in seriousness over the years. The fact that a defendant suffered a prior conviction is sufficient to support the imposition of the maximum penalty in a sentencing range. (*Jones v. United States* (1999) 526 U.S. 227, 248-249.) Prior convictions are traditional sentencing factors used by a judge and need not be submitted to a jury to support a sentence. (*United States v. Booker, supra*, 543 U.S. at p. 244.) As previously discussed, *other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. (*Ibid.*; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.) “[R]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.” (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 488.)

Consequently, defendant’s attack on the upper term lacks merit because imposition of the maximum term is traditionally allowed where a defendant has sustained a prior conviction.

C. *Defendant Failed to Prove he Received Ineffective Assistance of Counsel*

Defendant alleges that his new attorney, who was present at the sentencing hearing, rendered ineffective assistance because he failed to diligently advocate for him. Among counsel's shortcomings, defendant lists the following: he failed to file a *Romero* motion to strike the 15-year-old prior robbery, failed to file a sentencing memorandum, failed to object to the upper term, failed to indicate that the use of a knife could not be used as an aggravating factor when the jury hung on the weapon enhancement, and failed to request a lower sentence.

To demonstrate that he received ineffective assistance of counsel, a defendant must establish both (1) that his counsel's performance was deficient under an objective standard of professional competency, and (2) that there is a reasonable probability that, but for counsel's errors, a more favorable determination would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *In re Avena* (1996) 12 Cal.4th 694, 721; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Babbitt* (1988) 45 Cal.3d 660, 707; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267,

quoting *People v. Wilson* (1992) 3 Cal.4th 926, 936, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Contrary to defendant's assertion, the record here does not affirmatively disclose the reasons for any of defense counsel's actions other than the *Romero* motion. Other than clarifying that he did not file a *Romero* motion because he did not find any ineffective assistance on the part of trial counsel, defense counsel did not explain his actions.

There may be any number of reasons why defense counsel acted as he did. As noted by the prosecution, it is possible that defense counsel believed that the lack of mitigating factors and the defendant's lengthy criminal history could best be advocated by requesting leniency from the trial court. He may have contemplated that a *Romero* motion was not feasible because defendant's lengthy criminal history showed that he was "an exemplar of the 'revolving door' career criminal to whom the Three Strikes law [was] addressed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) He may have failed to object to the upper term because the decision in *Black* may have rendered it a futile motion. He may have considered that the prior convictions were properly proven. He may have thought it useless to object to the weapon allegation because there were many other aggravating factors supporting the upper term.

A claim of ineffective assistance of counsel will not be decided on appeal where the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th

at pp. 266-267.) Such claims are more appropriately handled in habeas corpus petitions. (*Ibid.*) Therefore, the decision must be affirmed on appeal.

D. The Abstract of Judgment Should Be Amended To Reflect The Correct Statutory Citation

The trial court sentenced defendant to a five-year enhancement pursuant to section 667.5, subdivision (b), rather than section 667, subdivision (a)(1). Both parties agree that the abstract of judgment does not reflect the correct statutory citation defendant was sentenced under. We agree with the parties that the abstract of judgment fails to reflect the correct statute under which the five-year enhancement was imposed and order the trial court to prepare an amended abstract with the correct statutory citation.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting that the five-year enhancement is imposed pursuant to section 667, subdivision (a)(1) and not section 667.5, subdivision (b). In all other respects, the judgment is affirmed.

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/s/ MILLER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ McKINSTER
J.